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**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MKB/171779

PRELIMINARY RECITALS

Pursuant to a petition filed January 29, 2016, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on March 17, 2016, at Waukesha, Wisconsin.

The issue for determination is whether the agency correctly determined the Petitioner is no longer eligible for the Katie Beckett program due to not meeting nursing home level of care criteria.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]
Bureau of Long-Term Support
1 West Wilson
Madison, WI

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Waukesha County. She is 14 years old and has been eligible for Wisconsin Medicaid through the Katie Beckett program since September 18, 2001. She has previously met the Nursing Home Level of Care.

2. On October 28, 2015, the Petitioner submitted a Recertification for Katie Beckett Program Wisconsin Medicaid. Her listed diagnoses include kyphoscoliosis, Pierre Robin sequence (a connective tissue disorder), feeding disorder and restrictive lung disease. She had a cervical spinal fusion on April 24, 2015. She has physical therapy 2x/month. The following information was reported by the Petitioner's parents on the Recertification application:
 - Bathing – Petitioner is able to get in/out of shower independently. Cleaning process is slow. Periodic assistance needed with hair shampooing and rinsing.
 - Grooming – Petitioner needs teeth checked due to wearing braces and for possible thrush due to treatment for eosinophilic esophagitis. Needs assistance with hair and nail care.
 - Dressing – Petitioner needs periodic assistance with zippers, shoes and boots.
 - Eating – Petitioner needs monitoring for caloric and fluid intake. She takes her own milk and water to school. She takes a multivitamin.
 - Toileting – Petitioner takes care of her own toileting needs.
 - Gross Motor – Petitioner is limited in turning side-to-side due to spinal fusion. She can sit up, crawl, stand, walk, climb stairs, transfer and position independently. She does not take part in physical education classes. She uses a rolling backpack and the elevator at school due to weight restriction. She receives assistance with getting her backpack on and off the bus.
 - Adaptive Aids for mobility – Petitioner uses adjustable chairs in the classroom.
 - Physical Therapy 2x/month
 - Speech therapy – on a consultative schedule due to wearing braces
 - Communication – Petitioner continues to have nasal emission. Good receptive communication skills. People have difficulty understanding her.
 - Learning at grade level.
 - Assistance at school – Petitioner requires assistance with her backpack due to weight restrictions. She uses the elevator at school and is allowed extra time to get to classes. She uses adjustable chairs in the classroom.
 - Social competency – Petitioner interacts well and is socially appropriate with family, teachers, peers. She has close friends. She is limited with her social activities due to medical issues.
 - No behaviors, mental health issues, emotional issues.
 - Nursing Care needs – stethoscope, PRN, full assistance needed.
3. Petitioner previously had a g-tube. This was discontinued on August 5, 2015.
4. The Petitioner's IEP notes that the Petitioner needs to be monitored closely during physical activities. She has a 10 pound weight restriction and is assisted with her backpack. It reports she has a new oral appliance to help with nasal emission and vocal quality. She is noted to have age-appropriate receptive and expressive language and is meeting 8th grade academic standards. She is reported to be socially competent. She is being seen on a consult basis for speech to monitor articulation skills and nasal emission. Short-term goals include working on improving upper body/core strength by participating in exercises for a minimum of 15 minutes/session. There is also a goal to work on improving her cardiovascular endurance through power walking/biking/hand-pedaling exercises for a minimum of 15 minutes/session.

5. On January 5, 2016, the agency issued a notice to the Petitioner and her parents that it determined she was no longer eligible for the Katie Beckett program because she does not meet required level of care criteria.
6. On January 29, 2016, an appeal was filed on behalf of the Petitioner with the Division of Hearings and Appeals.

DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting children under age 18, who are permanently disabled under Social Security criteria, to receive MA while living at home with their parents. Wis. Stats. §49.47(4)(c)1m. The Department of Health Services (DHS), Division of Long Term Care (DLTC) is required to review "Katie Beckett" waiver applications in a five-step process.

The first step is to determine whether the child is age 18 or younger and disabled. The disability determination is made by the Disability Determination Bureau. The DHS does not dispute that the Petitioner is disabled.

The second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. See 42 C.F.R. §435.225(b)(1). The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child. It is the level of care that is at issue here.

The Department asserts, in its letter dated February 4, 2016, that the Petitioner no longer meets any level of care criteria to be eligible for the Katie Beckett program. The Department's analysis is lacking in specificity as to how the Petitioner's fails to meet the level of care criteria. While the Department outlines the Petitioner's abilities and disabilities, it fails to complete the analysis by indicating how and why it determined she no longer meets the level of care criteria and what has changed in the Petitioner's condition to make her no longer eligible. It simply stated that she is no longer eligible without an explanation as to how specifically the Petitioner fails to meet the level of care criteria. The Department has the burden of proof when discontinuing benefits. The Department presented scant evidence and failed to complete a proper analysis; therefore, I must base my decision on the evidence presented and the level of care criteria outlined in the regulations and policies to determine if the Department's decision is correct.

The Department has developed policy which defines and describes those childhood care levels and contains the requirements needed to qualify for Child's Long Term Support Programs. This manual was updated in 2011 and can be found at <https://www.dhs.wisconsin.gov/clts/cltsloc.pdf>. The Petitioner was previously determined eligible based on a nursing home level of care, defined as follows in the policy:

*** The Nursing Home Level of Care**

The child with a Nursing Home - Physical Disabilities (PD) Level of Care has a long-term medical or physical condition, which significantly diminishes his/her functional capacity and interferes with the ability to perform age appropriate activities of daily living at home and in the community. This child requires an extraordinary degree of daily assistance from others to meet everyday routines and special medical needs. The special medical needs warrant skilled nursing interventions that require specialized training and monitoring that is significantly beyond that which is routinely provided to children. The intensity and frequency of required skilled nursing interventions must be so substantial that without direct, daily intervention, the child is at risk for institutionalization within a nursing home.

A child may be assigned this level of care if the child meets BOTH of the criteria listed below for Physical Disability. The criteria are:

1. The child has a Diagnosis of a medical/physical condition resulting in needs requiring long term care services; and
2. The child requires skilled Nursing Interventions and/or has Substantial Functional Limitations requiring hands on assistance from others throughout their day.

The Petitioner appears to have the requisite diagnoses of medical/physical conditions resulting in needs requiring long-term care services. She must also meet the second criteria of requiring skilled nursing interventions and/or having substantial functional limitations requiring daily assistance. With regard to the second criteria, the policy states as follows:

2. SKILLED NURSING INTERVENTIONS AND/OR SUBSTANTIAL FUNCTIONAL LIMITATIONS

The child must meet ONE of the two Standards (I-II) described below.

STANDARD I: Skilled Nursing Interventions PLUS Substantial Functional Limitations

The child must demonstrate BOTH a need for Skilled Nursing/Therapeutic Intervention PLUS TWO substantial functional limitations (A PLUS C, OR B PLUS C):

A. Needs and receives at least ONE Skilled Nursing Intervention listed below that must be performed daily and is reasonably expected to continue at least six months.

OR

B. Needs and receives at least TWO Skilled Nursing/Therapeutic Interventions listed below that must be performed at least weekly (or at the frequency noted below) and are both reasonably expected to continue at least six months.

Daily Skilled Nursing Interventions that apply to BOTH item A and B above are limited to the following and do not include site care:

- IV access: peripheral or central lines for fluids, medications or transfusions. Does not include the use of a port.
- Tracheostomy care
- Oxygen: oxygen use includes only skilled tasks such as titration, deep suctioning and checking blood saturation levels.
- Total Parenteral Nutrition (TPN)
- Tube feedings: G-tube, J-tube or NG-tubes
- Dialysis: hemodialysis or peritoneal, in home or at clinic.
- Respiratory treatments: chest PT, C-PAP, Bi-PAP, IPPB treatments. This does not include inhalers or nebulizers.
- Wound or special skin care: only applies if process takes more than one hour a day.

Additional Skilled Nursing/Therapeutic Interventions that can ONLY be applied for item B above:

- Bowel or ostomy: digital stimulation, ostomy site care, changing wafer, and irrigation.
- Urinary catheter: straight catheters, irrigations, instilling medications.

- Physical, occupational, or speech therapy: only applies if the child is involved in six or more sessions per week with professional therapists.
- NOTE: Medication administration for a reasonably stable condition, including topical or oral medication, eye drops, inhalers, nebulizers, growth hormone injections, insulin injections, or chemotherapy, is not considered a skilled nursing intervention.

In this case, the Petitioner previously relied on g-tube feedings and required daily assistance with the feedings. The Petitioner's parents testified that, as of August 5, 2015, she no longer uses the g-tube for feedings. It was also reported that she has been losing weight since then and there is a possibility that she will need to have g-tube feedings in the future if her caloric intake without them remains insufficient. However, as of the date of the hearing and recertification application, the Petitioner is no longer using g-tube for feedings. The only other possible skilled nursing interventions noted by the parents at the hearing included the need to periodically monitor the Petitioner's airway due to her restrictive lung disease. This was reported to occur daily when the Petitioner is sick. When she is not sick, it is done periodically though not on a weekly basis. Based on the information and evidence provided, I conclude that the Petitioner does not meet Standard IA because she does not require one of the listed skilled nursing interventions on a daily basis. Further, she does not meet Standard IB because she does not require at least two of the listed skilled nursing interventions on a weekly basis.

Standard II does not require any skilled nursing interventions. The policy states as follows:

STANDARD II: Substantial Functional Limitations

The child must have substantial functional limitations requiring daily direct hands on assistance in at least FOUR of the seven specific areas listed below that are reasonably expected to last for at least one year. There is no requirement of skilled nursing or therapeutic interventions for this Standard.

1. Learning: A 30% (25% if the child is under one year of age) or greater delay or a score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean based on valid, standardized and norm referenced measures of aggregate intellectual functioning.
2. Communication: A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of at least 2 (1.5 if under one year) standard deviations below the mean on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning.
3. Bathing: Refer to APPENDIX B. This Appendix describes the degree of deficit required in bathing to meet a substantial functional limitation based on the child's age.
4. Grooming or Dressing: Refer to APPENDIX B. This Appendix describes the degree of deficit required in grooming or dressing to meet a substantial functional limitation based on the child's age.
5. Eating: Refer to APPENDIX B. This Appendix describes the degree of deficit required in eating to meet a substantial functional limitation based on the child's age.
6. Toileting: Refer to APPENDIX B. This Appendix describes the degree of deficit required in toileting to meet a substantial functional limitation based on the child's age.
7. Mobility: Refer to APPENDIX B. This Appendix describes the degree of deficit required in mobility to meet a substantial functional limitation based on the child's age. The inability to run or to move long distances

or between environments related to stamina or ease of movement is NOT a mobility deficit.

Appendix B: Activities in Daily Living - Substantial Functional Limitations

A substantial functional limitation is a child's inability to perform daily functions without extensive, hands-on assistance significantly beyond the age at which similar aged peers typically require such assistance. This assistance must be needed by the child to complete the task or function at all, rather than to complete the task better, more quickly, or to make the task easier.

In order for a limitation to be considered a substantial functional limitation, it must:

- be the direct result of the child's disability; and
- be exhibited most of the time; and
- result in the child needing extensive, direct, hands-on adult intervention and assistance beyond the level of intervention similar aged peers typically require in order to avoid institutionalization.

In addition, the child must:

- require this assistance consistently, and
- require this assistance for at least the next 12 months, and
- require this assistance to complete the function across all settings, including home, school and community.

A child has a substantial functional limitation in an activity of daily living category (e.g., Bathing, Grooming, etc.) if the child exhibits at least ONE of the specific substantial functional limitations listed under the category for the child's particular age group.

12 - 17 years old

Bathing

Needs adaptive equipment.

Is combative during bathing (e.g., flails, takes 2 caregivers to accomplish task).

Needs physical help with bathing tasks.

Needs to be lifted in and out of bathtub or shower.

Needs step-by-step cueing to complete the task.

Lacks an understanding of risk and must be supervised for safety.

Exhibits non-compliant behavior that is extreme to point that child does not perform bathing tasks for at least 5 or more consecutive days.

Grooming (brushing teeth, washing hands and face only)

Is combative during grooming (e.g., flails, takes 2 caregivers to accomplish task).

Needs physical help with grooming tasks.

Needs step-by-step cueing during grooming tasks.

Exhibits non-compliant behavior that is extreme to point that child does not brush their teeth for at least 5 or more consecutive days.

Dressing

Needs physical assistance with getting clothing on. This does not include fasteners such as buttons, zippers, and snaps.

Eating

Needs help with tube feedings or TPN.

Needs to be fed.

Needs one-on-one monitoring to prevent choking, aspiration, or other serious complications.

Toileting

Incontinent of bowel and/or bladder.

Needs physical help, step-by-step cues, or toileting schedule.

Mobility

Does not walk or needs physical help to walk.

Uses a wheelchair or other mobility device not including a single cane.

Transfers

Needs physical help with transfers.

Uses a mechanical lift.

In this case, I conclude as follows with regard to the Petitioner's abilities in each of the categories of functional limitations based on the evidence:

Learning – though the Petitioner's parents expressed some concerns regarding learning, the Petitioner is performing at grade level in academics and is getting good grades. It is noted in the IEP that her teachers indicate she is prepared for class and does well. I conclude there is no evidence that the Petitioner has substantial functional limitations in this category.

Communication – the Petitioner had a cleft palate repaired which impacts her communication skills. Both her parents and teachers report she has good receptive communication skills. There is concern regarding her expressive communication, specifically her articulation skills. She was receiving speech therapy but this has been suspended or is being done on a consultative basis due to Petitioner getting braces which limits the ability to do speech therapy. Her parents report that people who know the Petitioner well are generally able to understand her but those who are not familiar with the Petitioner have difficulty. The policy requires evidence that an individual exhibit a 30% or greater delay or a standard score of at least 2 standard deviations below the mean on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning. In this case, there is no evidence that the Petitioner has a significant delay in both expressive and receptive communication so I must conclude that she does not have substantial limitations as defined by the policy.

Bathing – per the parents' report, the Petitioner requires assistance with shampooing and rinsing her hair in the shower. She is otherwise able to complete the physical bathing tasks, albeit slowly. The policy states that an individual has a substantial functional limitation if physical assistance is required most of the time, is the result of a disability and requires assistance beyond that required for similar-aged peers. Based on the evidence, I conclude the Petitioner does have substantial functional limitations in this category.

Grooming – Per the parents' report, the Petitioner requires assistance with hair and nail care. She also requires assistance with oral hygiene. Based on the evidence, I conclude the Petitioner does have substantial functional limitations in this category.

Eating – as of the time of the application and hearing, the Petitioner was eating independently and was not using g-tube feedings. She does need monitoring to ensure adequate caloric and fluid intake. While I recognize this is a major concern, at this time, she does not require physical

assistance with eating such as to allow me to conclude that she has substantial functional limitations with the physical act of eating.

Toileting – per the parents’ report, the Petitioner is independent with toileting tasks.

Mobility – while the Petitioner has some limitations with mobility, she is able to walk unassisted. She requires assistance in carrying items due to weight restrictions. She is also restricted from participating in certain physical activities due to her spinal fusion. However, she is able to walk, sit up, crawl, stand, walk, climb stairs, transfer and position independently. Therefore, I must conclude that she does not meet the criteria of having substantial functional limitations in mobility as defined in the policy.

Transfers – the Petitioner is able to complete transfers independently.

Based on the evidence presented, I conclude the Petitioner has substantial functional limitations in two of the categories in Standard II – bathing and grooming. In order to meet the eligibility criteria, there must be substantial functional limitations in at least four categories. Therefore, I must conclude that the Petitioner does not meet the criteria in Standard II.

In summary, I conclude the evidence demonstrates that the Petitioner does not meet the eligibility criteria for the nursing home level of care. Though the Department did not specify the change in the Petitioner’s condition that resulted in her no longer being eligible, the evidence demonstrates that it is likely that the fact that she no longer requires the daily assistance with g-tube feedings is a primary factor in the change in eligibility. Nothing in this decision prevents the Petitioner from re-applying for the Katie Beckett program if she once again requires g-tube feedings.

CONCLUSIONS OF LAW

The agency properly concluded the Petitioner is not eligible for the Katie Beckett program due to not meeting the nursing home level of care criteria.

THEREFORE, it is

ORDERED

That the Petitioner’s appeal is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

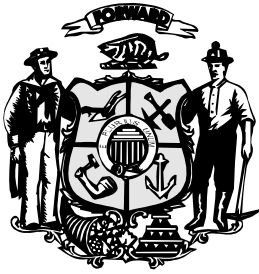
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 27th day of April, 2016

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on April 27, 2016.

Bureau of Long-Term Support
Division of Health Care Access and Accountability